SUPREME COURT, U. S.

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

CLAUDE EARL FLAHERTY AND
GENE WHIPPLE ..... *Petitioners,*

v.

STATE OF ARKANSAS ..... *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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The Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Arkansas entered in this matter on October 1, 1973.

CITATION TO OPINIONS BELOW

The Opinion of the Supreme Court of Arkansas (R. 320-329) is reported in 255 Ark. 187, 500 SW (2) 87, and is printed in Appendix A hereto, *infra.* The Order of the Arkansas Supreme Court denying Petition for Rehearing (R. 336) on November 3, 1973, is printed in Appendix B hereto, *infra.*

JURISDICTION

The Judgment of the Supreme Court of Arkansas was entered October 1, 1973 (R. 292). A timely Petition for Re-

hearing was denied on November 13, 1973 (R. 336). This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3), since this matter involves rights claimed under the Constitution of the United States and laws of the United States.

QUESTIONS PRESENTED

I.

Whether the Sixth Amendment has been violated by admitting the contents of tape recordings into evidence without providing Petitioners with the right to cross-examine the witnesses making the statements on tape; and Petitioners not being allowed the right to be confronted by said witnesses.

II.

Whether the state court may refuse to enforce the express language contained in Title 18, U.S.C., Section 2510 and 2511, and refuse to apply the previous ruling of this Court as set forth in *Lee vs. Florida*, 392 U.S. 378 (1968).

III.

Whether a police officer's answering of an accused's home telephone, and tape recording incoming calls, during a search with a warrant containing no authority therefor, constitutes a "seizure" prohibited by the Fourth Amendment and the Due Process clause of the Fourteenth Amendment to the U.S. Constitution.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 18 U.S.C., Section 2510 and 2511. They are printed in Appendix C hereto, *infra*.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional Provisions involved are the Fourth Amendment, the Confrontation Clause of the Sixth Amendment, and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. They are printed in Appendix D hereto, *infra*.

STATEMENT OF THE CASE

Petitioners were convicted of Operating A Gambling House under the Arkansas statutes, (Section 41-2001) on information and trial by Jury in the Sebastian Circuit Court at Fort Smith, Arkansas, on March 2, 1973. The offense allegedly occurred November 11, 1972.

Upon Appeal to the Arkansas Supreme Court, the convictions were affirmed, Oct. 1, 1973.

The Petitioner, Earl Flaherty, owned and had resided at his home in Fort Smith at 3209 Wirsing Avenue for 17 years prior to the arrest on November 11, 1972. The Police testified that for three weeks prior to the arrest they had watched the Flaherty home, and followed Flaherty and Gene Whipple, the other Petitioner, and had found no evidence of criminal violation. The Police obtained a Search Warrant to search the Flaherty home on November 11th for gambling equipment and related items.

The facts are undisputed that on November 11, 1972, the Police immediately knocked on the door of the Flaherty home, the door was unlocked, the Police were invited to enter and found Flaherty and his friend, Whipple seated in the living room of the home drinking coffee. Without searching the house the two Petitioners were immediately placed under arrest for the felony charge in this case, and held under arrest for more than an hour and then taken to jail.

The Search Warrant was issued only to search the Flaherty home for gambling equipment. The Police took the warrant to the Flaherty home, arrested the Petitioners upon being allowed to enter the home before searching same, brought with them electronic equipment and recording devices and

attached these to the Flaherty telephones. The Petitioners were kept under arrest where they could not answer the phone. The Police impersonated the Petitioner Flaherty for one hour, and answered the telephone in his name (R. 235). None of this activity was authorized by the Search Warrant, and none of this activity was alleged to have been accidental by the Police.

At the trial in Court the tape recordings made of the alleged conversations between the Police officer in the Flaherty home and certain unnamed persons calling on the phone were introduced into evidence over objection against these Petitioners for operating a gambling house.

The Petitioners objected to the admission of the Police officers answering the phone and the taping of the incoming calls without consent of these Petitioners upon the premise that this was an illegal interception of said phone calls under 18 U.S.C., Section 2510 and 2511.

Also, Petitioners objected to the playing of the recordings of the phone conversations before the Jury as not allowing the Petitioners to be confronted with their witnesses testifying against them and not being allowed to cross-examine same in violation of the Sixth Amendment to the United States Constitution. So far as Petitioners have been able to learn there have been no rulings in this Court on this particular issue.

The Police testified that while they were at the Flaherty home on November 11, 1972, that no bets were made or received by these Petitioners or anyone else. The officer taking the calls stated, "I was the only person at the Flaherty home during that hour that received any bets, if they were bets." (R. 231)

REASONS FOR GRANTING THE WRIT

I.

The decision below denies the right to confrontation by witnesses guaranteed by the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The Sixth Amendment to the United States Constitution provides that, "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .". Apparently, there is no case on record where this Court has construed the issue raised in this case, as to whether or not the people talking on the tape recordings and used as witnesses against the Petitioners, comes within the purview of this Constitutional provision cited above. There have been numerous cases in the Supreme Courts of various States dealing with related aspects of this question, and there have been various interpretations as to same.

In this advanced age of scientific research and electronic development, and the use of recording equipment, more and more cases will be brought before the Courts involving this same issue. It is the considered opinion of counsel, that this issue is important to many citizens of the United States, from the highest on down to these humble Petitioners.

Racing forms that are sold in all the newsstands, telephones that are used in every home, and grocery ticket books that are used by all grocery stores, (but were classified as betting slips in this case), were introduced in evidence as gambling equipment, here. But, there were no bettors, no betting and the *principal evidence* used to convict these Petitioners were the *alleged phone callers.*

According to the Police, the only betting in the Flaherty

home took place over the telephone with the incoming calls. The Petitioners didn't bet and the Police didn't bet. (R. 231) Therefore, it is respectfully suggested that the *callers were used as witnesses* against these Petitioners.

The Arkansas Supreme Court in *Barnes vs State*, 215 Ark. 781, 223 SW (2) 503, stated that it was error to introduce the confession of an alleged accomplice against the Defendant, without giving the Defendant the right to cross-examine the witness in violation of the Constitution. The legal principle there is the same as in the case at Bar.

Rathbun vs U.S., 355 U.S. 107, (1957), is the nearest decision that we have as to the case at Bar. The Police were called to a man's office where he was being threatened over the phone. With the consent of the owner of the office the Police listened on an extension telephone that was already there in the office while the owner talked to the person who was threatening him on the phone. This was held admissible.

In the *Rathbun* case the Supreme Court emphasized two things, to wit:

(1). The conversation overheard was with the consent of one party to the conversation, and,

(2). The telephone extension had not been installed just for that purpose.

In this case no one consented to the Police listening to the conversation, and electronic devices were *installed after* the Police arrived.

In view of the above, Petitioners respectfully suggest that it was error to allow the testimony and conversations of the callers on the telephone to be recorded and played to the Jury in this case, and used as witnesses against these Petitioners in violation of the Sixth Amendment to the United States Constitution.

II.

The decision of the Arkansas Supreme Court apparently is a refusal to enforce the express language of the Federal Statute contained in Title 18, U.S.C., Section 2511 and related sections, and is an apparent refusal to apply the previous ruling of this Court as set forth in *Lee vs. Florida,* 392 U.S. 378 (1968).

Title 18, U.S.C., Section 2510 and 2511 state that it is a violation of the law to intercept telephone calls, and to relate their contents to other parties. At the time that the recording tapes were offered into evidence and about to be played to the Jury in the Trial Court, Petitioners strenuously objected, and tried to ask the Police officer if he were familiar with this Federal law, before he testified as to the interception of the phone calls in this case. The Trial Court overruled the objection, and told the Police officer to go ahead and answer and testify. (R. 204)

Lee vs Florida, 392 U.S. 378, is the authority for saying that such Federal laws prohibiting the interception of telephone calls is *applicable to State prosecutions,* and that it is a violation for the Police officer to intercept such telephone calls, record such calls, and play them before a jury, *as in the case at Bar.*

This decision and the Federal statute were both brought to the attention of the Trial Court and the Arkansas Supreme Court. Both Courts apparently thought that so long as there was *no secret bugging* of the Flaherty telephone that it was not a violation of the law, and therefore, in our respectful opinion, *misapplied* the *above Federal statute,* and the *decision of this Court* to the case at Bar.

The proposition that there was no interception because the Police officer's acquisition of the telephone communica-

tion resulted from his answering the telephone when they rang and *not* "through the use of any electronic, mechanical, or other device" flies squarely into the face of common sense, because it is a fact that he acquired the communication by means of a tape recorder fastened to the telephone receivers (R. 201). Obviously, a tape recorder with a contrivance for fastening it to a telephone receiver is a "device or apparatus which can be used to intercept a wire or oral communication" under 18 U.S.C. Section 2510 (5). Obviously, by this means the Police officer aurally acquired the communication. Whether the Police officer had a right to answer the telephones, listen to the callers' communications, and testify about them later from memory is another matter, yet to be dealt with. It does not change the facts in this case.

There is nothing in the statutory language to indicate that Congress intended, when defining "interception," to work a transmutation of its essential connotation, i.e., the act of taking, seizing, or stopping something by the way or before arrival at its intended destination. See, e.g., Webster's *Third New International Dictionary, Unabridged.* The Police officer in this case quite plainly took, seized, and stopped the communications by the way and *before* the communications reached their intended destination, to wit, the ears of the owner of the home where the telephones were situated. To say there was no interception involved is an illogical exercise in verbal gymnastics.

The Supreme Court of Arkansas went on to hold, in effect, that given an interception, it was, nevertheless, not prohibited because under 18 U.S.C. Section 2511 (2) (c) the Police officer was a person acting under color of law and was a party to the conversations. It is true that the Police officer was a party to the conversations, *though his right to be such is denied.* The main question at this juncture, however, is

whether he was acting under "color of law." Congress has not defined this term in the pertinent law. If 18 U.S.C. Section 2511 (2) (c) is to be interpreted consistently with the Constitution, the term must mean "with legal authority" or something to like effect. For, if it were taken to mean only the "appearance or semblance, without the substance, of legal right," see Black's Law Dictionary, 4th ed., the statute would permit what the law prohibits. In the circumstances, it is suggested that the term "color of law" should be equated with a valid search and seizure warrant, a *valid interception order*, or the equivalent.

III.

The decision of the Arkansas Supreme Court apparently approves the Police officer answering the accused's home telephone and tape recording of incoming calls during a search of the premises, when the *warrant contained no authority* for such acts.

The Police apparently secured the Search Warrant merely as a ruse or pretense to take over the Flaherty home and telephones, *without his permission*. The Police planned this carefully, because they brought with them the necessary electronic equipment and recording devices.

Neither the Affidavits filed to obtain the Search Warrants, nor the Order issuing same, refers to a possible seizure of the telephone lines into the Flaherty home or the right to intercept telephone calls and the recording of same (R. 7, 11, and Supp. 4).

Silverman vs U.S., 365 U.S. 505 (1961) and *Katz vs U.S.*, 389 U.S., 347 (1967), have established that the reach of the Fourth Amendment extends not only to tangible things but to *"communications"* as well. It follows, therefore, that the

telephone communications which are concerned here are within the limits of the Fourth Amendment's protection. Thus, the question becomes whether the search and seizure with respect to the telephone communications can be constitutionally justified.

It is familiar law that the requirement of the Fourth Amendment that Search Warrants particularly describe what may be seized, prevents the seizure of one thing under a warrant describing another. *Burger vs New York,* 388 U.S. 41, (1967); *Stanford vs Texas,* 379 U.S. 476 (1965).

The exception to this rule, referring to instrumentalities or fruits of crime, and evidence a nexus with crime, can have no application here because these exceptions patently were carved out of a rule to accomodate the exigencies often arising during searches in which *unexpected* evidence is discovered. Here. the Police had no excuse for failing to secure a warrant authorizing the seizure of telephone communications. *They expected to take these calls prior to going to the Flaherty home,* and for that reason, brought recording equipment with them.

Consequently, this Court should accept as dispositive of this issue, its language in *Coolidge vs New Hampshire,* 403 U.S. 443 (1971), to the effect that if the initial intrusion is based upon a Search Warrant which fails to mention a particular object, though the Police know its location and intent to seize it, *then there is a violation* of the express constitutional requirement that Search Warrants must *describe the thing to be seized,* and that the scope of such warrant should not be extended to the seizure of things which the Police know in advance they will find in plain view and intend to seize same. See also *Stanley vs Georgia,* 394 U.S. 557 (1969).

Petitioners respectfully suggest that they would have much preferred to have their phone "bugged" without their knowl-

edge, rather than to be placed under arrest while the Police physically took over the telephones, impersonated Petitioner, and proceeded to answer all calls. Petitioners further state that this is a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

If the telephones had been secretly "bugged" by the Police, then, at least the Petitioners would have had a right to accept phone calls, and *either accept* or *reject any offer* of betting. However, in this case by the Police physically invading the Flaherty home, holding them in custody, and physically taking over the phone, *the Petitioners had no choice* in the matter, and yet they are now supposed to be punished as felons for violating the law on account of the conduct of the Police. Again, Petitioners believe that this is a violation of the Fourteenth Amendment to the United States Constitution.

Further, when the Police put this electronic device on the phone of the Petitioners, to record the incoming calls, they were under a *duty by law to notify the callers* on the phone, or to signal same, so that the callers *might be put on notice* that their messages were being recorded. The rights of these individuals were ignored and violated, if any. The rent on this telephone was being paid by Flaherty, and it was his telephone, and we respectfully suggest that the Police did not have a right to appropriate same to their own use as was done in this case.

In *Lee vs Florida*, cited above, this Court stated that, "No Court, State or Federal, may serve as an accomplice in the wilful transgression of the laws of the United States, laws by which the Judges of every State are bound under Article 6 of the Constitution."

Petitioners respectfully suggest that if this situation is ignored by this Court, and in view of our advanced electronic age, and with the eagerness of some Police for "law and order"

at any price, there cannot help but be repeated invasions of privacy and untold suffering for many innocent people in the years to come. Therefore, we respectfully ask that this situation be ruled upon by this Honorable Court.

CONCLUSION

Since the Arkansas Supreme Court in this case has apparently ignored the right of Defendants to be confronted by their witnesses against them and cross examine same, has apparently ignored the illegality of the search of the premises of these petitioners, and has apparently approved the police intercepting telephone calls without permission of anyone. . . Petitioners respectfully suggest that THREE important questions of substance, *not* heretofore decided by the U.S. Supreme Court, have been decided by the Arkansas Court. Further, that the Supreme Court of Arkansas has apparently decided the questions in a way contrary to the principles established by pertinent decisions of this Court.

Wherefore Petitioners respectfully ask that this petition for certiorari be granted.

Respectfully submitted,

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APPENDIX "A"

SUPREME COURT OF ARKANSAS

No. CR 73-70

Opinion Delivered Oct. 1, 1973

APPEAL FROM SEBASTIAN CIRCUIT COURT,
PAUL WOLFE, *Judge*

CLAUDE EARL FLAHERTY AND
GENE WHIPPLE, Appellants
V.
STATE OF ARKANSAS, Appellee

AFFIRMED (R. 320-329)

FRANK HOLT, Associate Justice

The appellants were charged and convicted of operating a gambling house in violation of Ark. Stat. Ann. § 41-2001 (Repl. 1964). The jury assessed a one year penitentiary sentence for each of them. For reversal of the judgment, the appellants first contend there was no gambling conducted at appellant Flaherty's home and, therefore, the evidence was insufficient to support a conviction for operating a gambling house.

The state adduced evidence that for approximately three weeks the police had observed Whipple driving Flaherty's car during which time he was picking up and delivering parlay cards. The police, with a search warrant, went to Flaherty's residence where they were invited in. The search warrant was exhibited and both appellants, the only occupants, were placed under arrest. The officers then discovered parlay cards, betting slips, racing forms, and a stack of football schedule sheets. For approximately one hour, an officer answered and tape

recorded all incoming telephone calls. These calls were mostly from people placing bets on football games and horse racing. The callers would identify themselves either by first name or initials. Some would ask to speak to Earl (appellant Flaherty) and some would ask for Whip (appellant Whipple). During this hour two individuals appeared at the residence and upon police inquiry it was determined they had in their possession a weekly football schedule. As a result of the raid the police confiscated and introduced into evidence one telephone listed in Flaherty's name and another in a relative's name; a small indexed code book containing unidentified numbers; envelopes containing a large quantity of what appeared to be betting slips with "numbers" on them: numerous parlay cards and parlay card stubs; a roll of money wrapped with a rubber band ($1,174); a sack containing 121 weekly current football schedule sheets. racing forms; and an envelope with telephone bills. The appellants did not testify.

On appeal we review that evidence which is most favorable to the appellee with all reasonable inferences deducible therefrom and we must affirm if there is any substantial evidence to support the finding of the trier of the facts. *Miller v. State,* 253 Ark. ....., 490 S.W.2d 445 (1973). In the case at bar, we are of the view that the evidence was amply substantial to sustain the findings of the jury.

The argument is further made that Flaherty's home could not constitute a gambling house since he had lived for many years in a nice residential area and his neighbors testified they had observed no gambling activities about his premises. This was a fact question to be considered by the jury. Furthermore, in *Liberto & Mothershed v. State,* 248 Ark. 350, 451 S.W.2d 464 (1970), we said "the keeping of a gambling house is not limited to a place where those engaged in gambling find shelter."

Appellant next asserts that the admission of the telephone recordings into evidence was error. The police officer placed a suction cup, or recording device, on the mouthpiece of the telephone receiver. Whenever the phone rang the conversation was recorded. The portable cassette tape recorder was admitted into evidence and the recorded conversations, between the officer and the callers placing bets, were heard by the jury. The appellants contend that the recordings were inadmissible hearsay and in violation of the Federal Communications Act, 47 U.S.C. § 605, and further the introduction of the evidence denied appellants their Sixth Amendment right to confront witnesses against them. We cannot agree.

In *Liberto & Mothershed v. State, supra,* the officer answered incoming telephone callers placing bets. We approved the admissibility of the officer's testimony as being permissible to show that the out-of-court statement "***is not hearsay if it is given in evidence for the purpose of proving that the statement was made, providing that the purpose is otherwise relevant in the case at trial. The statements here given were obviously relevant to show the use of the telephone numbers involved." Similarly, in the case at bar, the officer could have testified as to the conversations he heard since such testimony is not introduced to support the truth of the matter asserted, but only to show that such statements were made. On the same basis, the tape recorded conversations were admissible.

Appellants also assert that the tape recording was inadmissible as being in violation of Federal Communications Act, 47 U.S.C. § 605. We examine this contention in the light of 18 U.S.C. § 2510, et. seq., which is the wire interception provision of the Omnibus Crime Control and Safe Streets Act. That section is the 1968 amendment to 47 U.S.C. § 605. In the case at bar, we consider § 2510, et. seq., controlling. The

question then becomes whether the officer at the Flaherty residence improperly "intercepted" the communication in violation of 18 U.S.C. § 2511, which would render the contents of the communication inadmissible in a court of law as required by 18 U.S.C. § 2515. "Intercept" is defined in § 2510 as meaning the "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." The authorities are to the effect that testimony repeating the contents of police answered telephone calls during a valid search is admissible in evidence pursuant to either § 605 or § 2511.

In *United States v. Pasha,* 332 F.2d 193 (7th Cir. 1964), a government agent was assigned to answer calls to an apartment during the search. The contents of those calls were testified to during defendant's prosecution for failure to pay an occupational tax on gambling. The testimony was held relevant, not hearsay, and admissible as circumstantial evidence of the type of operations conducted on the premises. Further, the officer's impersonation of defendant was held not to constitute an "interception" under 47 U.S.C. § 605. See, also, *Rathbun v. United States,* 355 U.S. 107, 78 S.St. 161, 2 L. Ed. 2d 134 (1957).

The 1968 enactment of 18 U.S.C. § 2511 (2) (c) provides:

> "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."

As we construe this section, it cannot be said that the officer in the case at bar illegally intercepted the telephone communications.

A most recent case on this subject is *State v. Vizzini,* 115

N.J. Super. 97, 278 A.2d 235 (1971). There the defendant was convicted of permitting his premises to be used to conduct a lottery. During a valid search of Defendant's home an induction coil (like the one used in the case at bar) was placed on the phone to record incoming calls. The callers placed bets. The defendant objected, as here, to the introduction of the tape at trial. The New Jersey court held that no interception had taken place, making the same distinction that was utilized in interpreting the old act 47 U.S.C. § 605, *supra:*

> "Castellano's (the police officer) acquisition of the contents of the telephonic communications resulted from his answering the telephone when it rang, not 'through the use of any electronic, mechanical or other device.'
> "In answering the telephone when it rang, he did not 'intercept' the telephone calls in violation of the federal act." (See *Rathbun v. United States,* 355 U.S. 107, 78 S. Ct. 161, 2 L. ED. 2d 134 (1957).

Similarly, in the case at bar, the taped recordings were admissible since the incoming calls were not intercepted and recorded in violation of any federal act. We need not deal in fine distinctions as to the meaning of the word "intercept," since 18 U.S.C. 2511 (2) (c), *supra,* clearly states that no illegal interception takes place when an officer is a party to the communication acting under color of law. The device on the telephone received recorded conversations the officer legally heard and could have testified to from memory.

Nor can we agree with appellants' argument that presenting the taped conversations to the jury was a violation of their Sixth Amendment right to confront the witnesses against them. The officer, who took the incoming calls and recorded them, testified and was subjected to cross-examination. As previously discussed the tapes reproduced the voices of those

placing bets and were admissible to show that such statements (calls) were made. We perceive no violation of the confrontation clause.

Appellants further contend that the trial court erred in refusing their instruction which would allow the jury to consider a conviction under Ark. Stat. Ann. § 41-2003 (repl. 1964) (misdemeanor statute for keeping a gaming device). Appellants assert that they were entitled to this instruction because keeping a gaming device is a lesser included offense within the alleged offense of operating a gambling house.

The intricacies of lesser offenses in Arkansas were recently explored at length in *Caton & Headley v. State,* 252 Ark. 420, 479 S.W.2d 537 (1972), and need not be repeated here. There we said that in order to find error in the refusal of the trial court to give a requested lesser offense instruction it must appear that the offense in the requested instruction was one necessarily contained within the higher offense and the evidence showed the existence of all the elements of the lesser offense. So in *Caton, supra,* it was not error to refuse a shoplifting instruction where the information did not charge that the merchandise taken was offered for sale by a store or other mercantile establishment which are elements required by Ark. Stat. Ann. 41-3939 (Repl. 1964). In *Caton, Supra,* we further said:

> "Unless the lower offense is necessarily included within the higher, there is no reason why the prosecuting attorney or the grand jury should not have the option of charging the more serious offense and ignoring the latter."

In the instant case defendants were charged with operating a gambling house. The mere possession of gambling devices is not necessarily included within that offense. One could be

criminally liable under the statute for allowing gambling in his house but have no gambling devices there (for example, matching coins, tossing pennies, betting on football games or horse races). Even if we were to find that the evidence seized here constituted gambling devices, since the information did not so charge and since the misdemeanor statute is not necessarily included in the felony statute, we hold the trial court did not err in refusing the instruction although it would not have constituted error to give it.

As was noted similarly in *Caton, supra,* we are not saying that there cannot be a conviction for possession of gambling devices based upon a charge of operating a gambling house. Such a conviction might be possible if the charge alleges the elements of the lesser offense and the evidence would support the conviction. Furthermore, a defendant can always request a bill of particulars to determine the specific acts alleged to constitute the particular offense. Ark. Stat. Ann. § 43-1006 and § 43-804 (Repl. 1963).

Appellants also contend that the trial court erred in refusing their instruction to the effect that every man's house or place of residence is deemed in law as being his castle. Ark. Stat. Ann. § 41-2233 (repl. 1964). This statute appears in the homicide section of Title 41 and is no doubt intended to emphasize the sanctity of the home in relation to self-defense and the retreat doctrine. The argument appellants present is novel. However, it is irrelevant because the conviction is based on substantial evidence which was lawfully seized. The trial court is not required to give abstract instructions which are not germane to a fact issue. *Stevens v. State,* 246 Ark. 1200, 411 S.W.2d 451 (1969). Neither can we agree that appellants' counsel was erroneously stopped by the court from presenting the argument to the jury that one's home is his castle with the right to have and read racing forms since the record does not

include that part of the proceedings or any portion of the arguments to the jury.

Finally, appellants assert that the evidence taken from Flaherty's home was based upon an illegal search. The search warrant was issued by the trial judge based upon an affidavit of a policeman and one by a deputy prosecuting attorney. At a hearing on a motion to suppress, the appellants adduced evidence from some witnesses who contradicted the statements made by the affiants. One of the affiants, the deputy prosecuting attorney, was called as a witness for the appellants. The deputy had stated in his affidavit that Flaherty was a known gambler. He testified at the hearing that to his knowledge neither appellant had ever been convicted of gambling and he had no personal knowledge of the correctness of the telephone bills attached to his affidavit. The appellee presented no witnesses and stood upon the affidavits. Appellants make the argument that there was no probable cause for the issuance of the search warrant. We cannot agree.

The officer's affidavit was to the effect that he and another officer had made an "extensive investigation of gambling operations" locally; he had information that a local printing company "printed parlay cards which were being used for betting on college and professional football games;" he had information that Flaherty had 1,250 parlay cards printed weekly by the local printer and Whipple "was a runner for Flaherty;" Whipple was observed leaving Flaherty's residence; Flaherty's car, driven by Whipple, had been followed and observed by him and another officer, stopping at various places picking up and leaving parlay cards; and Whipple was seen by him leaving the printing company with parlay cards in his hand. The deputy prosecuting attorney's affidavit was to the effect that during his four years as deputy he had "worked on several cases involving gambling activities" locally; the police

had given him continuing reports about their investigation of local gambling activities; appellant Flaherty and his nephew, Billy Reeder, were co-defendants in 1969 on a charge of operating a gambling house; Flaherty was acquitted and Reeder was convicted, receiving a suspended sentence which was later revoked because of his continued gambling activities; that during the revocation hearing, there was evidence Flaherty and Reeder had maintained frequent telephone contacts with each other by intra-city or long distance calls; a charge of operating a gambling house against Flaherty in an adjoining county was dismissed because of a defective search warrant; and the current telephone records of Flaherty and Reeder reflected approximately 150 intra-city or long distance calls between them for about three months prior to the raid of Flaherty's premises. These current phone records were made a part of the deputy prosecutor's affidavit.

An affidavit based upon hearsay information can be a basis for the issuance of a valid search warrant. *Jones v. United States,* 362 U.S. 257, 80 U.C.Ct. 725 (1960). There the court said:

> "We have decided that, as hearsay alone does not render an affidavit insufficient **** so long as there was a substantial basis for crediting the hearsay."

To the same effect is *Aguilar v. Texas,* 378 U.S. 108 (1964); *Spinelli v. United States,* 393 U.S. 410 (1969); *U. S. v. McClard,* 333 F. Supp. 158 (E. D. Ark. 1971); *Glover v. State,* 248 Ark. 1260, 455 S.W. 2d 670 (1970).

The authorities, as succinctly reviewed in *McClard, supra,* are also to the effect that the affidavit for a search warrant is sufficient if it relates facts which are sufficient to persuade the examining court, acting as a reasonable person, to believe probable cause exists that a law violation is occurring on the

premises to be searched. The affidavit need not assert facts which establish conclusively or beyond a reasonable doubt that a violation of the law exists on the premises. Probable cause exists where knowledge of facts or circumstances is imparted to the examining court sufficient to persuade an ordinarily prudent person to actually believe in good faith, as opposed to mere suspicion, that the facts asserted in the affidavit are true. The examining court has the right to give at least some credence and weight to an experienced law enforcement officer because of his expertise. The judicial determination by the examining court that probable cause exists for the issuance of a search warrant is entitled to considerable deference and weight by a reviewing court.

In the case at bar, the affidavits were based upon information acquired during an extensive and continuous investigation as well as upon personal observations of experienced law enforcement officials. We cannot agree that contradictory evidence adduced by appellants at the hearing on the motion to suppresss vitiated the search warrant. See, *Liberto v. State, supra.* We hold that the affidavits constituted a substantial basis to support the court's judicial determination that probable cause existed for the issuance of the search warrant.

Finding no error, the judgment is affirmed.

Affirmed. (R. 320-329)

APPENDIX "B"

STATE OF ARKANSAS
In The Supreme Court

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 1st day, being the first Monday of October, A.D. 1973, amongst others were the following proceedings, to wit:

On the 13th day of November, A.D. 1973, a day of said term .....

Claude Earl Flaherty and Gene Whipple, APPELLANTS

Appeal from Sebastian Circuit Court

No. CR 73-70 vs. State of Arkansas, APPELLEE.

Rehearing denied.

IN TESTIMONY, That the above is a true copy of the Order of said Supreme Court, rendered in the case therein stated, I, JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 29th day of November, A.D. 1973.

/s/ Jimmy H. Hawkins, Clerk.

APPENDIX "C"

TITLE 18, U.S.C. Section 2510

§ 2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary

course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents," when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance purport, or meaning of that communication;

(11) "aggrived person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 212.

TITLE 18, U.S.C. Section 2511

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when——

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) sucn person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of wnich affect interstate or foreign commerce, or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the in-

formation was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: Provided, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcemet officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission, in the enforcement of chapter 5 of title 47 of the

United States Code, to intercept a wire communication, or oral communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the

foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 213, and amended Pub. L. 91-358, Title II, § 211 (a), July 29, 1970, 84 Stat. 654.

APPENDIX "D"

Fourth Amendment to the United States Constitution

(Unreasonable searches and seizures.)—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and *particularly describing the place to be searched and the persons or things to be seized.*

Sixth Amendment to the United States Constitution

(Rights of the accused.)—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him;* to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment to the United States Constitution

§ 1. (Citizenship—Due process of law—Equal protection.) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

73-1169

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MICHAEL ROBAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

Claude Earl Flaherty and
Gene Whipple ..... *Petitioners*

V.

State of Arkansas ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT IN OPPOSITION

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TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 500 S.W.2d 87 and is reproduced at page 14 of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Constitutional rights of Petitioners were violated by policemen who answered petitioner Flaherty's telephone and recorded incoming calls or by the subsequent introduction of said recordings into evidence in a State Court prosecution for Operation of a Gambling House.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional Provisions involved are the Fourth Amendment, the Sixth Amendment "confrontation" clause, and the Due Process clause of the Fourteenth Amendment of the United States Constitution.

STATEMENT

Petitioners were convicted of Operating a Gambling House under Arkansas Statutes Annotated §41-2001.

Petitioner Flaherty owned a house in Fort Smith, Arkansas. After a three week investigation, the police obtained a search warrant and entered the Flaherty home on November 11, 1972. Both petitioners were placed under arrest and a search of the building produced numerous parlay cards, betting slips, racing forms, and football schedule sheets.

For approximately an hour a police officer answered the Flaherty telephone and recorded the incoming calls which consisted of conversations of persons wishing to place bets on horse races and football games. These recordings were placed in evidence at trial over defense objections.

ARGUMENT

Petitioners' constitutional rights were not violated. The decision below does not conflict with any federal statute or decision.

Petitioners first suggested that the callers whose voices were recorded were " . . . used as witnesses against these Petitioners . . . " and that petitioners' Sixth Amendment rights of confrontation were thereby denied.

The conversations were recorded by an officer who placed a suction device on the receiver of Flaherty's telephone. The officer then impersonated one or the other of the petitioners and pretended to receive and record wagers.

The Arkansas Supreme Court dealt with this exact issue and concluded that the recordings were introduced for the purpose of proving that the statements were made and that the officer could have testified as to the conversations he heard. Clearly the officer was the witness against petitioners and not the people who called. The officer was, of course, subject to cross-examination and the recordings were merely physical evidence supporting his testimony, namely that when he answered the telephone the callers attempted to place bets. *Liberto v. State*, 248 Ark. 350, 451 S.W.2d 464.

The cited case of *Rathbun v. United States*, 355 U.S. 107, 2 L. Ed. 2d 134, 78 S. Ct. 161, wherein the *defendant's* voice was overheard by officers when he threatened the life of one Sparks, is inapplicable to the present case except insofar as it held that the actions of the police did not amount to an "interception" under 47 U.S.C. §605.

Petitioners urge that the conversations were "intercepted" and recorded in violation of 18 U.S.C. §2511 and that the Arkansas Supreme Court's holding to the contrary disregards *Lee v. Florida*, 392 U.S. 378, 20 L. Ed. 2d 1166, 88 S. Ct. 2096.

The *Lee* case involved a situation where officers had a telephone connected to Lee's line without his knowledge and recorded conversations thereby.

> "What was done here was a far cry from the police activity in *Rathbun v. United States* (citation omitted), a case heavily relied upon by the respondent. There we found no interception where 'a communication [is] overheard on a regularly used telephone extension' . . . In the present case, by contrast, there was neither 'the consent of one party' nor a 'regularly used' telephone . . . " (392 U.S. at 381)

The *Lee* case is inapplicable to the case at bar. The Flaherty telephone was already installed and the officers merely answered it when it rang. No calls were "intercepted" within the meaning of 47 U.S.C. §605 or 18 U.S.C. §2510, et. seq. See *United States v. Pasha*, 332 F. 2d 193 (7th Cir. 1964).

It should be noted that the equipment used by the police in the present case, namely a small tape recorder and a "pickup" to be affixed to the telephone receiver, did not enable the police to listen to conversations that could not have been heard otherwise. The equipment merely allowed the police to obtain the most reliable evidence of the conversations possible. See *Lopez v. United States*, 373 U.S. 427, 10 L. Ed. 2d 462, 83 S. Ct. 1381.

Finally it is submitted by respondent and conceded by petitioners that the police officer was a *party* to the conversations within the meaning of 18 U.S.C. §2511(d).

Petitioners argue that the recordation of the telephone conversations was illegal since not provided for in the search warrant. While this exact argument was not presented to the Arkansas Supreme Court, respondent nevertheless replies that it is without merit.

First, the act of the officers in answering the telephone and recording the conversations was not a "seizure". The warrant provided for the seizure of the material (parlay cards, betting slips, racing forms, etc.) actually seized. There was no requirement that the warrant state the intention of the police to answer the telephone.

Secondly, it should be noted that petitioners concede that the police were *invited* to enter the Flaherty home.

Finally, it is argued that the purpose of the search warrant is to describe the things to be seized and the persons or place to be searched. The warrant in the instant case fulfilled that purpose and the act of the police in answering the telephone had nothing to do with the warrant. The cases of *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022, where an automobile was searched without a warrant, and *Stanley v. Georgia*, 394 U.S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243, where officers discovered pornographic material in the course of a search for evidence of illegal bookmaking, are not even remotely applicable to the case at bar.

On the basis of the foregoing, respondent argues that the decision below correctly interpreted the applicable

federal statutes and case law. Further, none of the petitioners' constitutional rights were at any time violated. Therefore, no basis has been presented for the granting of certiorari.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

CLAUDE EARL FLAHERTY AND
GENE WHIPPLE ..... *Petitioners*

v.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

REPLY BRIEF
FOR PETITIONERS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

CLAUDE EARL FLAHERTY AND
GENE WHIPPLE ..... *Petitioners*

v.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

REPLY TO BRIEF
OF RESPONDENT

I.

Petitioners respectfully deny that the tape recordings introduced in this case were merely physical evidence supporting the officers testimony.

The recording equipment and electronic devices to tape the phone calls were brought to the Flaherty home delib-

erately to establish a "smoke screen" of betting, when in fact there was none. The tapes were introduced in evidence, and played to the jury in regard to these alleged bets, *as independent evidence*. The officer *did not testify independently* as to these bets being accepted by him. The tapes were played as evidence of the actual conversations taking place, and this is *all the evidence* that was introduced as to these alleged bets taken over the telephone. (R. 206-224)

At the conclusion of these tapes being played, exceptions being saved, mistrial being requested and denied, and exceptions saved, the *officer then stated,* "I have no idea who I was talking to over the phone during any of the foregoing conversations." (R. 228)

2.

Respondent claims that the *Lee vs Florida, 392 U.S. 378,* case does not apply, because the Flaherty telephone was already installed. This statement borders on the ridiculous. In all these cases a telephone has already been installed. The point of this case is, that the *officers installed electronic devices* to the Flaherty phone without permission, and then proceeded to *tape the calls,* and then *introduced the calls in evidence* without consent from the caller or the person to whom the calls were intended . . . *the owner of the telephone,* (the Petitioner who was being impersonated by said officer.)

3.

Respondents say that the Petitioners conceded that the Police were invited to enter the Flaherty home. *Petitioners do not concede* that the Police were invited to intercept phone calls in violation of the Federal law, were not invited to arrest the Petitioners without a warrant, were not invited to search the house, and were not invited to impersonate these Petitioners.

4.

Respondents state that the act of the Police in answering the telephone had nothing to do with the search warrant, and therefore, *Coolidge vs New Hampshire, 403 U.S. 443,* does not apply.

Actually, this very fact that the Police were not authorized by the warrant to answer the telephone, tape calls, intercept calls, intercept messages is one of the main objections that Petitioners have in this case. Also, this is exactly why *Coolidge vs New Hamphire* does apply, because the *officers knew in advance* that they were going to the Flaherty home for the express purpose of holding the Petitioners under arrest while they impersonated them, and answered the telephone and taped the calls.

CONCLUSION

For the foregoing reasons it is respectfully suggested that the Argument of the Respondents should have no effect on the Petition filed in this case, and that said Petition should be granted in accordance with our original request.

Respectfully Submitted,

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